

WEBINAR

WEDNESDAYS



Wednesday, January 20, 2021

THE ADMISSIBILITY AND PRESENTATION OF BUSINESS RECORDS

Presented by:

W. Scott Harkey
Senior Financial Crimes Prosecutor
North Carolina Conference of District Attorneys

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
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ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR

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–The Economist, 2017

Admissibility and Presentation of Business Records

W. Scott Harkey
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Objectives

Admissibility

Presentation

Practical Tips

Admissibility

Hearsay

Hearsay Exception

Confrontation Clause

Authentication

Best Evidence Rule



Hearsay

- A statement the declarant does not make while testifying at the current trial or hearing; and
- A party offers in evidence to prove the truth of the matter asserted

Rule Against Hearsay

- Hearsay is not admissible unless any of the following provides otherwise:
 - an applicable constitutional provision or statute;
 - these rules; or
 - other rules prescribed by the Supreme Court

What are you using the business records for?

- Truth of the matter asserted, then find an exception.
- Not for the truth of the matter asserted, then no hearsay issue.

Admissibility

Hearsay

Hearsay Exception



Records of Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

- A. the record was made at or near the time by - or from information transmitted by - someone with knowledge;
- B. the record was kept in the course of a regularly conducted business activity of a business, organization, occupation, or calling, whether or not for profit;
- C. making the record was a regular practice of that activity;
- D. all these conditions are shown by the testimony of a custodian or other qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- E. the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

EXAMPLES

- **Bank Records** - *State v Ritacca*, 169 Ariz. 401 (App.1991).
- **Credit Card Records** - *State v. Parker*, 231 Ariz. 391 (2013).
- **Timesheets** - *State v. Parker*, 231 Ariz. 391 (2013).
- **Drug Transaction Ledgers** - *State v. Petzoldt*, 172 Ariz. 272 (App. 1991).
- **Intoxilyzer Maintenance and Calibration Records** - *Bohsancurt v. Eisenberg*, 212 Ariz. 182 (App. 2006).
- **Hospital Records** - *Tamsen v. Weber*, 166 Ariz 364 (App. 1990).
- **Invoices & Charges** - *GM Dec. Corp. v. Community Am. Mtg. Corp*, 165 Ariz. 1 (App. 1990).
- **Emails** - *State v. Richardson*, No. COA19-232, 2019 WL 5726998 (N.C. App. Nov. 5, 2019) (unpublished).
- **Cell phone records** - *State v. Crawley*, 217 N.C. App. 509 (2011).
- **GPS Evidence** - *State v. Triplett*, 316 N.C. 1 (1986).

Other Exclusions/Exceptions

- **Opposing Party's Statement.** Ariz. R. Evid. 801(2)
- **Statement Made for Medical Diagnosis or Treatment.** Ariz. R. Evid. 803(4)
- **Absence of a Record of Regularly Conducted Activity.** Ariz. R. Evid. 803(7)
- **Public Records.** Ariz. R. Evid. 803(8)
- **Absence of Public Records.** Ariz. R. Evid. 803(9)
- **Statements in Documents That Affect an Interest in Property.** Ariz. R. Evid. 803(14)
- **Residual Exception.** Ariz. R. Evid. 807

Residual Hearsay Exception

1. The statement is supported by sufficient guarantees of trustworthiness - after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
2. It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.
3. Notice requirement

Residual Hearsay Exception

1. Guarantees of Trustworthiness

- Created using advanced systems
- Internal corroboration
- External corroboration

2. More Probative

- Material facts & best evidence

Admissibility

Hearsay

Hearsay Exception

Confrontation Clause



Confrontation Clause

- In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”
- Statement is excluded if:
 1. Testimonial
 2. Declarant is unavailable
 3. No prior opportunity to cross examine

Confrontation Clause

1. Testimonial

- Courts have never given us a comprehensive definition
- *Ex parte* statement of a witness with an eye toward prosecution
- Business records, by their nature, are non-testimonial.

Crawford v. Washington, 541 U.S. 36, 68 (2004); *State v. Parker*, 231 Ariz. 391 (2013).

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Authentication



803(6) Authentication

Records of Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

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- C. making the record was a regular practice of that activity;
- D. all these conditions are shown by the testimony of a custodian or other qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- E. the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

803(6) Authentication

1. Live testimony of custodian
2. Live testimony of other qualified witness
3. Affidavit complying with 902(11) or 902(12)
4. Or by statute

Custodian or Other Qualified Witness

- Are you familiar with the business entries and system under which those entries are made at [business name]?
- Specifically, are you familiar with [record type] marked as State's Exhibit #5?
- Were these [record type] made and kept in the course of regularly conducted business at [business name]?
- Is it a regular practice of [business name] to make these [record type]?
- Were these [record type] made at or near the time of the events described in the [record type]?
- Were these [record type] made by, or from information transmitted by, a person with knowledge of these [record type]?

Custodian or Other Qualified Witness

- Business records are not required to be authenticated by the person who made them
- May be established by circumstantial evidence
- Once authenticated, the records custodian, even if unfamiliar with particular transactions, may provide testimony about the records

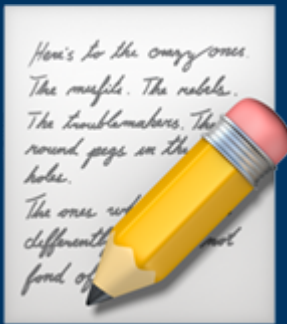
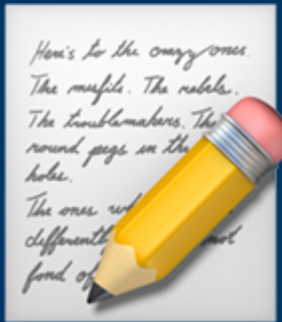
Affidavit/Certification

- Ariz. R. Evid. 902(11)
 - The original or a copy of a domestic record that meets the requirements of 803(6)(A)-(C), as shown by a certification of a a custodian or another qualified person that complies with a statute or a rule prescribed by the Supreme Court.
 - Notice + Opportunity to inspect certification/records
- Ariz. R. Evid. 902(12)
 - Foreign Records. Only applies to civil cases.

Affidavit/Certification

- Confrontation Clause Issue?
 - An affidavit used to establish a foundation for the admissibility of business records is non-testimonial.
 - The Confrontation Clause does not include the right to confront a records custodian who submits a . . . certification of a record that was created in the course of regularly conducted business.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009); *United States v. Denton*, 944 F.3d 170, 184 (4th Cir. 2019).



RECEIPT	
JUL 17	
MISFITS.....	0.00
SQUARE PEGS.....	0.00
ROUND HOLES.....	0.00
	0.00



Authentication

- **Witness With Knowledge.** Ariz. R. Evid. 901(1).
- **Distinctive Characteristics.** Ariz. R. Evid. 901(4).
- **Evidence About Public Records.** Ariz. R. Evid. 901(7).
- **Evidence About Process or System.** Ariz. R. Evid. 901(9).
- **Methods Provided by Statute.** Ariz. R. Evid. 901(10).
- **Domestic Public Documents.** Ariz. R. Evid. 902(1)-(2).
- **Foreign Public Documents.** Ariz. R. Evid. 902(3).
- **Certified Copies of Public Records.** Ariz. R. Evid. 902(4).
- **Acknowledged Documents.** Ariz. R. Evid. 902(8).
- **Commercial Paper & Related Documents.** Ariz. R. Evid. 902(9).
- **Presumptions Under Statutes.** Ariz. R. Evid. 902(10).
- **Certified Records Generated by an Electronic Process System.** Ariz. R. Evid. 902(13)
- **Certified Data Copied From an Electronic Device, Storage Medium, or File.** Ariz. R. Evid. 902(14)

Admissibility

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Best Evidence Rule



Best Evidence Rule

- Applies to “**writings**, recordings, photographs, or video”
- Original is required to prove its content
- Duplicate is admissible unless
 - Genuine questions about original’s authenticity; or
 - Circumstances make it unfair to admit duplicate

Presentation

- Business records themselves
- Summary, chart, calculation, etc.
 1. Rule 1006 Summary
 2. Rule 611(a) Pedagogical Device Summary
 3. Rule 611(a) Secondary Evidence Summary

Records Themselves



FABRICATION AUTOMATION, LLC
2772 CONCORD PARKWAY SOUTH
CONCORD NC 28027

Account Number: 4000212720
Capture Date: January 13, 2011
Item Number: 5250243322453
Posted Date: January 13, 2011
Posted Item Number: 501798
Serial Number: 11030
Amount: 1,276.60
BOFD Return RT: UNKNOWN
BOFD Sequence: 6535302879

DA002809

DOCUMENTS PRINTED ON CHEMICALLY REACTIVE PAPER THAT RESISTS TAMPERING AND IS SUITABLE FOR EVIDENCE COLLECTION. WASH WITH WATER.

FABRICATION AUTOMATION LLC 2772 CONCORD PKWY SOUTH CONCORD NC 28027 704 785 2120		Cabarrus Bank & Trust Concord, NC 28025 66-1248/531	11030
PAY TO THE ORDER OF Carolyn D Sides		1/3/2011	\$ 1,276.60
One Thousand Two Hundred Seventy-Six and 60/100		DOLLARS	
Carolyn D Sides PO Box 157 Mt Pleasant, NC 28124			
MEMO	Pay Period. 12/26/2010 01/08/2011		
⑈011030⑈ ⑈053112482⑈ 4000212720⑈			

Rule 1006

- May use summary, chart, or calculation to prove contents of:
 - Voluminous writings
 - Cannot be conveniently examined
- Underlying records must be admissible
- Must be an accurate summarization of the underlying material
- The summary itself is the evidence

Rule 611(a) Pedagogical Device

- The court controls the
 - Mode of examining witnesses
 - Mode of presenting evidence

Rule 611(a) Pedagogical Device

- Aids the presentation and comprehension of evidence already admitted
- Created before or during trial
- Not admitted into evidence
- Cautionary instruction required

**CERTIFICATE OF ACKNOWLEDGEMENT PURSUANT TO NORTH CAROLINA RULES
OF EVIDENCE 902(8) & 803(6)**

I, Rebecca B. Bost, attest on penalty of criminal punishment for false statement or false attestation that I was Vice President, Support Services at Uwharrie Capital Corp, holding company for Cabarrus Bank & Trust until its consolidation with Uwharrie Bank in 2013; at which time I became Vice President, Deposit Operations of Uwharrie Bank, the successor entity to Cabarrus Bank & Trust. I was a custodian of records for Cabarrus Bank & Trust and Uwharrie Bank during the time periods relevant to the attached records and am currently a custodian of records for Uwharrie Bank.

I have reviewed the attached records and I certify that these records are the original or duplicate copies of the original records in the custody of Uwharrie Bank, located at 167 North Second Street, Albemarle, NC 28001.

I further state that:

- A. I am familiar with the business entries and the system under which they are made;
- B. such records are true and correct copies;
- C. such records were made, at or near the time of the occurrence of the matters set forth therein, by (or from information transmitted by) a person with knowledge of these matters;
- D. the business activity made such records as a regular practice; and
- E. such records were kept in the course of a regularly conducted business activity

I certify, under the penalties of perjury, that the foregoing is true and accurate, to the best of my knowledge and belief.

Executed on February 22, 2017

Rebecca B. Bost

Rebecca B. Bost, VP Deposit Operations
Uwharrie Bank
167 North Second Street
Albemarle, NC 28001

State of North Carolina
County of Stanly

I, the undersigned Notary Public of the County and State aforesaid, certify that Rebecca B. Bost personally appeared before me this day and acknowledged that she is Vice President, Deposit Operations of Uwharrie Bank and that by the authority duly given and as the act of such entity, she signed the foregoing instrument in its name on its behalf as its act and deed.

Witness my hand and official seal, this the 22 day of February, 2017.

My Commission expires: July 20, 2020

Susan S. Tucker

Notary Public



Account Number: 4000212720
Capture Date: January 13, 2011
Item Number: 5250243322453
Posted Date: January 13, 2011
Posted Item Number: 501798
Serial Number: 11030
Amount: 1,276.60
BOFD Return RT: UNKNOWN
BOFD Sequence: 6535302879

FABRICATION AUTOMATION, LLC
2772 CONCORD PARKWAY SOUTH
CONCORD NC 28027

FABRICATION AUTOMATION, LLC 2772 CONCORD PKWY SOUTH CONCORD NC 28027 704 785 2120		Cabarrus Bank & Trust Concord, NC 28025 66-1248/531	11030
PAY TO THE ORDER OF Carolyn D Sides		1/3/2011	
One Thousand Two Hundred Seventy-Six and 60/100*****		\$ 1,276.60	
Carolyn D Sides PO Box 157 Mt Pleasant, NC 28124			
MEMO Pay Period: 12/26/2010 01/08/2011			
⑈000000⑈ ⑆093112482⑆ 4000212720⑈			

Attention Check Verifier

DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE
RESERVED FOR FINANCIAL INSTITUTION USE

ENCLOSURE

1/12/2011 12:00 PM 604 NC 20581088

Rule 611(a) Pedagogical Device

- Have you had the opportunity to review the bank records of Fabrication Automation that are marked State's Exhibit #1-#8?
- Have you had the opportunity to review the Quickbooks entries of Fabrication Automation - marked as State's Exhibits #9-#14?
- Did you assemble relevant data from these exhibits into a spreadsheet?
- Would this spreadsheet help you explain your testimony to the jury?
- Approach, Identify, Publish

<u>ALL CHECKS WRITTEN TO CAROLYN D. SIDES - 2011 TO 2014</u>					<u>FINAL UPDATE/REVIEW SEPT. 2017</u>		
Check Date	Bank Date	Check #	Payee	Amount	Memo	Quickbooks - Memo	
<u>TOTAL 2011-2014</u>			<u>\$206,168.62</u>				
1/3/2011	1/13/2011	11030	Carolyn D. Sides	\$1,276.60	pay period 12/26/2010-01/08/2011	nothing in memo	-\$1,276.60
1/12/2011	1/13/2011	11048	Carolyn D. Sides	\$449.75	pay period 01/09/2011-01/22/2011	nothing in memo	-\$449.75
1/20/2011	1/27/2011	11037	Carolyn D. Sides	\$1,160.64	pay period 01/09/2011-01/22/2011	nothing in memo	-\$1,160.64
1/25/2011	1/27/2011	11076	Carolyn D. Sides	\$449.75	pay period 01/23/2011-02/05/2011	nothing in memo	-\$449.75
1/26/2011	1/27/2011	11075	Carolyn D. Sides	\$449.75	pay period 01/23/2011-01/26/2011	nothing in memo	-\$449.75
2/1/2011	2/4/2011	11106	Carolyn D. Sides	\$1,276.60	pay period 01/23/2011-02/05/2011	nothing in memo	-\$1,276.60
2/17/2011	2/28/2011	11132	Carolyn D. Sides	\$515.38	office supplies	office supplies	
2/24/2011	2/28/2011	11141	Carolyn D. Sides	\$457.37	Label machine, etc	Label machine, etc.	
3/2/2011	3/15/2011	11184	Carolyn D. Sides	\$1,276.60	pay period 02/19/2011-03/04-2011	nothing in memo	\$1,276.60
3/14/2011	3/15/2011	11199	Carolyn D. Sides	\$449.75	pay period 03/15/2011-03/15/2011	nothing in memo	-\$449.75
3/14/2011	3/15/2011	11195	Carolyn D. Sides	\$1,276.60	pay period 03/05/2011-03/18/2011	nothing in memo	-\$1,276.60
3/14/2011	3/15/2011	11197	Carolyn D. Sides	\$449.75	pay period 03/06/2011-03/19/2011	nothing in memo	-\$449.75
3/29/2011	4/5/2011	11228	Carolyn D. Sides	\$101.95	Reimbursement	Reinbursement	
3/30/2011	5/20/2011	11180	Carolyn D. Sides	\$1,276.60	pay period 03/19/2011-04/01/2011	nothing in memo	-\$1,276.60
3/30/2011	4/5/2011	11243	Carolyn D. Sides	\$1,276.60	pay period 03/19/2011-04/01/2011	Not In QB	
3/30/2011	4/19/2011	11273	Carolyn D. Sides	\$1,276.60	pay period 03/19/2011-04/01/2011	Not In QB	
5/23/2011	5/26/2011	11369	Carolyn D. Sides	\$1,276.60	pay period 05/14/2011-05/27/2011	nothing in memo	-\$1,276.60
6/22/2011	7/29/2011	11394	Carolyn D. Sides	\$1,276.60	pay period 06/11/2011-06/24/2011	nothing in memo	
6/30/2011	7/1/2011	11175	Carolyn D. Sides	\$1,276.60	pay period 06/25/2011-07/08/2011	Not In QB	
7/18/2011	7/19/2011	11414	Carolyn D. Sides	\$1,276.60	pay period 07/09/2011-07/22/2011	nothing in memo	-\$1,276.80
8/3/2011	8/16/2011	11444	Carolyn D. Sides	\$1,276.60	pay period 07/23/2011-08/05/2011	Not In QB	
8/1/2011	8/2/2011	11445	Carolyn D. Sides	\$1,276.60	pay period 07/23/2011-08/05/2011	nothing in memo	-\$1,276.60
8/15/2011	8/16/2011	11483	Carolyn D. Sides	\$1,276.60	pay period 08/06/2011-08/18/2011	nothing in memo	-\$1,276.60
8/22/2011	8/23/2011	11314	Carolyn D. Sides	\$449.75	pay period 08/09/2011-08/22/2011	nothing in memo	-\$449.75
8/22/2011	8/23/2011	11316	Carolyn D. Sides	\$449.75	pay period 08/22/2011-08/22/2011	nothing in memo	-\$449.75
8/22/2011	8/23/2011	11495	Carolyn D. Sides	\$449.75	pay period 08/09/2011-08/22/2011	nothing in memo	-\$449.75
8/24/2011	8/23/2011	11492	Carolyn D. Sides	\$449.75	pay period 08/22/2011-08/22/2011	Not In QB	
8/29/2011	8/31/2011	11526	Carolyn D. Sides	\$1,276.60	pay period 08/20/2011-09/02/2011	nothing in memo	-\$1,276.60

Rule 611(a) - Secondary Evidence

- Combination of 1006 and 611(a) summaries
- Not in compliance with Rule 1006
- But they are accurate and reliable summaries
- Admitted in addition to evidence they summarize
- Requires limiting instruction

Admissibility and Presentation of Business Records

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